their duties and powers as the Management Committee of the Society. In the meantime, the writ of summons, the statement of claim, and the Order for the interim injunction, were served on defendants No. 1, No. 2, No. 3 and No. 5 on January 15, 1979. As a result, conditional appearance was entered by the defendants on January 20, 1979.

Subsequently, on January 23, 1979, the defendants filed two notices of motion in which the defendants applied —

(1) to set aside the writ of summons dated January 9, 1979;

(2) to dissolve the Order of Interim Injunction of the same date;

(3) for an inquiry into the damage caused to the defendants as undertaken by the plaintiff in his application for the interim injunction; and

(4) the cost of the application.

This application came before me and it was argued by counsel for the defendants that the judicial proceedings taken by the plaintiff were premature and should not therefore be entertained by the court in view of section 49 of the Cooperative Societies Ordinance. On the contrary, the plaintiff argued that whatever was required to be done under that section was fully complied with and therefore judicial proceedings taken by the plaintiff is proper and as such the defendants' Notices of Motion should be dismissed with cost.

According to facts gleaned from the affidavits used in this case, after the election of the defendants on November 18, 1978, it was discovered that their elections were secured by forged proxy votes and other irregularities. Subsequently, on December 12, 1978, the Registrar General of Cooperatives was informed of these irregularities in a meeting attended by Mr. Menon, the Treasurer of the Society. At this meeting, the Registrar General advised that a Police report should be lodged. He also expressed the view that he could not intervene in the dispute. On December 16, the first defendant was informed of the irregularities in the election. The solicitor for the plaintiff on January 4 wrote to the Registrar General of Cooperatives alleging the irregularities of the elections of the defendants and asked the Registrar General for a consent to refer the dispute to the court (Exhibit CBK1). On January 9, the Registrar General wrote on the five defendants requiring them to comment on the allegation of irregular election made by the plaintiff within a week; otherwise the department would take the necessary action under section 49 of the Ordinance (Exhibit 'A' in Affidavit of Nallathamby dated January 22, 1979). In the meantime, on January 23, 1979, the Registrar General of Cooperatives wrote to the solicitor for the plaintiff stating that the dispute being a dispute under section 49 of the Cooperative Ordinance, is now required to be settled by court in accordance with section 49(2)(c) of the Cooperative Ordinance.

There is no explanation on the part of the defendants whether they have answered to the query asked for by the Registrar General on January 9. The time within which they have to reply to that letter should expire on January 16. It would appear from records that the defendants did nothing to reply to the letter by the Registrar General. Indeed in my judgment the first defendants appeared to be indifferent as he did nothing when he was informed of the allegation of the irregularities by Tharumaratnam on December 16. (paragraph 21 of Tharumaratnam's Affidavit dated January 9 — enclosure (6)). The defendants only took action after they had been served with the Writ of Summons, the Statement of Claim and the Interim Order of Injunction on January 15, by entering conditional appearance on January 20, and filed these two motions on January 23 to set aside the Writ and the Interim Order.

There is no need for me to refer to any authorities to decide this case as I take it that the law on this matter is very clear, in that the court will not entertain any judicial proceedings where remedies provided for by statute have not been complied with. The question here is whether or not the process under the statute has been complied with. I agree with the submission made by Mr. Sri Ram, counsel for the plaintiff/respondent, that whatever acts which must be complied with under section 49 of the Cooperative Ordinance had in fact been fully complied with. According to various affidavits and the evidence available on record, the defendants did nothing until they were served by the Writs, although the first defendant was informed of the irregularities as early as December 16 last year and they were required by the Registrar General of Cooperatives to answer the charges made against them under a letter dated January 9. Furthermore, it is clear that the Registrar General in this case, as evidenced by his letter dated January 23, decided that the matter should be settled by court. In my view, all these facts amount to sufficient compliance with section 49 and, in particular, subsection (2)(c), of the Cooperative Ordinance. Hence I dismiss these two motions with costs.

Motions dismissed.

Solicitors: *James Foong & Co.; Vohrah & Tan Chee Lan.*

PERBADANAN KEMAJUAN NEGERI SELANGOR v. PUBLIC BANK BHD.

[O.C.J. (Mohamed Azmi J.) February 27, 1979]

[Kuala Lumpur — Civil Suit No. 144 of 1974]

Contract — Building Contract — Guarantee — Security deposit by bank — Consideration — Whether there have been variations in building contract — Whether claim on guarantee time-barred — Whether claim maintainable when liability of principal not ascertained — Contracts Act, 1950, ss. 79, 80 & 86.

In this case a construction company was successful in a tender for pile foundation and sub-structure for a building project. Under the contract the construction company agreed to carry out the works and agreed, as a condition precedent to the commencement of any work, to deposit with the plaintiffs a cash amount or an approved banker's guarantee equal to 5% of the contract soon sum. The construction company obtained a banker's guarantee from the defendant bank and the work commenced. The construction company subsequently got into financial difficulties and had to abandon the work. The plaintiffs claimed the amount guaranteed in the banker's guarantee from the defendant bank. Liability was denied on four main grounds:- (1) there had been variations in the building contract; (2) no consideration for the guarantee had been given; (3) the claim was time-barred and (4) the liability of the defen-

dant was co-extensive with that of the construction company and since the extent of the liability had not been ascertained, the claim was not maintainable.

Held: (1) there had been no variation in the building contract as the plaintiffs had an option to accept cash or the bank guarantee and the date of taking possession of the work site was conditional on the fulfilment of the condition of giving the cash or the bank guarantee;

(2) in this case there was consideration for the contract of guarantee as the creditor-bank had done something for the benefit of the principal debtor, as it enabled the principal debtor to commence work under the building contract;

(3) the plaintiffs had made a claim within the period of the guarantee and their claim was not barred by limitation;

(4) the defendant was not a party to the main contract but only to the contract of guarantee. His liability was co-extensive with that of the construction company that is to 5% of the contract sum, even though not to the whole of the contract sum.

Cases referred to:-

(1) *Lewis* v. *Brass* (1877) 3 Q.B.D. 667 C.A.

(2) *Wanthier* v. *Wilson* (1971) 28 T.L.R. 239.

(3) *Ram Narain* v. *Lt. Col. Hari Singh* A.I.R. 1964 Rajasthan 56.

(4) *Guild* v. *Conrad* [1894] 2 Q.B. 885.

The following cases were also cited in argument: *Smeaton Hanscomb* v. *Sassoon* [1953] 2 All E.R., 471; *Atlantic Shipping and Trading Co.* v. *Louis Dreyfus* [1922] 2 A.C. 250; *West Wake Price* v. *Ching* [1956] 3 All E.R. 821; *Watts* v. *Vickers* (1917) 116 T.L.R. 172; *Hj. Mohamed Dom* v. *Sakiman* [1956] M.L.J. 45.

CIVIL SUIT.

Mohamed Ismail bin Shariff (*J.W. Durai* with him) for the plaintiffs.

Chin Yew Meng for the defendant.

Cur. Adv. Vult.

Mohamed Azmi J.: Some time in 1972, the plaintiffs invited various tenders for the construction of a twelve-storey building at Jalan Raja Laut, Kuala Lumpur. It is common ground that the tender in respect of pile foundation and sub-structure of the building project submitted by Beton Construction Co. Sdn. Bhd. (hereinafter referred to as "Beton") was accepted on September 4, 1972 (Exhibit P2). By letter dated October 13, 1972, Mr. Yong Poh Kah (PW1), the Chief Structural Engineer employed by the plaintiffs, who was also the "Superintending Officer" under clause 4 of the contract, informed Beton that its tender had been accepted by the plaintiffs. Under a contract dated and executed on October 16, 1972 (AB1), Beton — referred to in the contract as "The Contractor" — agreed to carry out foundation and sub-structure works of the said building for the plaintiffs at a cost of $2,713,323.82 plus other sums that may be payable under the terms of the contract. Pursuant to clause 40 of the condition of contract, Beton was required, as a condition precedent to the commencement of any work, to deposit with the plaintiffs a cash amount or an approved banker's guarantee equal to 5% of the contract sum to be referred to as "Security Deposit". Beton obtained a banker's guarantee dated October 12, 1972 from the defendant bank (AB2), and accordingly construction work commenced on or about October 16, 1972 when possession of the work site was handed to Beton. Some time in the middle of 1973, Beton got into financial difficulties and the construction work came to a complete halt on or about July 12, 1973. On October 8, 1973 a winding-up order was made against Beton at the instance of its creditors. In February 1974, the plaintiffs filed the present claim against the bank to recover the sum of $135,666 — the amount guaranteed by the defendant in the banker's guarantee dated October 12, 1972. The defendant bank denies liability on four main grounds. Firstly, it is contended that there have been variations made to the building contract. Secondly, no consideration for the guarantee was given. Thirdly, the claim is time-barred; and, lastly, the liability of the defendant is co-extensive with that of Beton and since the extent of the amount claimable under clause 37(c)(v) of the contract has not been ascertained, the claim is not maintainable. The banker's guarantee (AB2), which is addressed to the plaintiffs and forms the basis of the plaintiffs' claim, is reproduced below:

"PUBLIC BANK BERHAD
KUALA LUMPUR

12th October, 1972

To Perbadanan Kemajuan Negeri Selangor, Petaling Jaya.

Sir,

SECURITY GUARANTEE

As requested by the Contractor Beton Construction Co. Ltd., No. 8, Leboh Ampang, Kuala Lumpur, we hereby guarantee that the sum of $135,666 (Dollars one hundred and thirty-five thousand six hundred and sixty-six only) being the amount of Security Deposit required for the due performance of the covenants of their contract with you re: construction of piled foundation and sub-structure of sub-basement and basement for 12 storey office cum Shopping Centre at Jalan Raja Laut Tambahan, Kuala Lumpur shall become payable by us in the event of the Contractor's failure to perform the said covenants. This guarantee is effective from 15th October, 1972 to 15th January, 1974 or further to the actual completion date of the contract for which this guarantee is submitted if duly notified by your authorised representative and confirmed by us in writing countersigned by the Contractor and is conditional upon a claim thereunder being made by the original or any revised expiry date, as is duly notified by your authorised representative.

Yours faithfully,
for PUBLIC BANK BERHAD
KUALA LUMPUR
Sd.
.....
Manager
Sd.
.....
Accountant."

Before dealing with the defendant's four main grounds, it is necessary to relate and consider how the banker's guarantee came into being. It cannot be seriously challenged that defendant bank issued the written guarantee to the plaintiffs for the purpose of enabling Beton to commence work pursuant to clause 40 of the conditions of the Building Contract. Clause 40 provides:

"The Contractor shall, as a condition precedent to the commencement of any work under this Contract, deposit with Government, a cash amount or an approved banker's guarantee equal to five per cent of the Contract Sum as a fund (hereinafter referred to as the 'Security Deposit'). It is agreed that the Superintending Officer may utilize and make payments out of or deductions from the said Security Deposit in accordance with the terms of this Contract."

It is the contention of the defendant that clause 40 does not contain any option to Beton regarding the mode of giving "Security Deposit". It is its contention that Beton has to deposit $135,666 in cash in addition to banker's guarantee for a similar sum. I see no justification for this interpretation having regard

to the clear words in clause 40. It is my finding that under the said clause, Beton has to deposit with the plaintiffs 5% of the contract sum as a condition precedent to the commencement of any work under the contract, and this security deposit can either be made in cash or by way of banker's guarantee. In my view, the fact that in the Acceptance of Tender (Exhibit P2) Beton's attention was drawn to the conditions of tendering whereby it would be required on the day it executes the formal contract agreement to deposit 5% of the contract sum as security deposit, does not alter the clear meaning of clause 40. On the contrary, the fact that paragraph 3 of the Acceptance of Tender merely talks of 5% of the contract sum without stating the cash amount shows that it is the intention of the parties that paragraph 3 of the Acceptance of Tender merely forewarns Beton as to the rate of the security deposit, whilst clause 40 apart from repeating the rate also stipulates the alternative mode in which the deposit could be made. There is in fact no inconsistency between paragraph 3 of Acceptance of Tender (Exhibit P2) and clause 40 of the conditions of contract (AB1 page 61). Clause 33(a) of the conditions of contract (AB1 page 59) also provides that no work under the contract shall be commenced by Beton unless and until —

(a) the contract agreement has been executed by all parties; and

(b) the security deposit stipulated under clause 40 has been deposited with the plaintiffs.

Thus, pursuant to clause 33(a), the contract agreement was executed by all parties on October 16, 1972, and, according to the evidence of PW1, the defendant's bank guarantee dated October 12, 1972 was handed to him on the same day. In this connection, I accept the evidence of PW1 that both the execution of the contract and the production of the bank guarantee occurred on the same day. I further accept his evidence that if the security guarantee had not been produced to him, he would not have allowed Beton to commence work.

On the first line of defence, if I understand counsel for the defendant correctly, it is contended that after the security deposit was issued by the bank on October 12, 1972, the contract between the plaintiffs and Beton has been varied on two aspects; and since these variations are made without defendant's consent, the defendant is not liable under the security guarantee subsequent to the variations by virtue of section 86 of the Contracts Act. The question for determination is whether there have in fact been variations of the contract. The first alleged variation is based on the defence contention that there is no option in clause 40. In Acceptance of Tender (Exhibit P2), the defence alleges that the plaintiffs requested Beton to pay cash, but subsequently pursuant to clause 40 of conditions of contract, the plaintiffs did not insist on cash but accepted banker's guarantee. The argument is that, when the plaintiffs accepted the bank guarantee from the defendant without calling for cash deposit, they permitted Beton not to observe clause 40. In view of my finding that there is in fact option given to Beton under clause 40 as to the mode of giving "Security Deposit" and paragraph 3 of the Acceptance of Tender is in fact consistent with clause 40, there is in fact no variation on this matter. As regards the second variation, it is alleged that there is change in the date of taking possession of work-site by Beton. In paragraph 4 of Acceptance of Tender (Exhibit P2), the date was September 1972, but according to the evidence of PW1, he nominated October 16, 1972 to be the date of possession of site. In my view, there is no actual variation. PW1 nominated October 16, 1972 as the date of taking possession because that was the date Beton had fulfilled the two pre-conditions required by clause 33(a) before Beton could be allowed to commence work. It is important to observe that the tender by Beton was accepted by the plaintiffs on September 4, 1972 and this acceptance was communicated to Beton by PW1. In law, there is already a binding contract between the plaintiffs and Beton on September 4, 1972. The fact that a formal agreement has to be entered into does not mean there is no contract in existence until formal contract is signed. (See *Lewis* v. *Brass*[1]). Paragraph (1) of the Acceptance of Tender (Exhibit P2), which in fact is a letter of acceptance by the plaintiffs of Beton's tender, is sufficient to bind both parties contractually. Under paragraph (1), the acceptance is not only subject to the letter of acceptance, but also to the conditions of contract, specifications and/or Bills of Quantities and Form of Tender. All these documents must be read together, although paragraphs 2, 3, 4 and 5 of the letter of acceptance appear to be informative in character. This is consistent with the definition of the term "contract" in clause 3 of the written contract (AB1 page 2). Further, paragraph 4 of the letter relating to the date for possession of site is subject to compliance of paragraph 3. As stated earlier on, paragraph 3 is silent as to the mode of payment of the security deposit, although the rate (at 5% of the contract sum) is stated. The parties to the contract must, therefore, look to clause 40 as regards mode of payment of the security deposit. The date "September 1972" is conditional on compliance with paragraph 3 of the letter. Since paragraph 3 was complied with by Beton only on October 16, 1972, it cannot be said that the plaintiffs and Beton have varied the terms of the contract as to date for possession. The month and the year stated in the letter of acceptance is merely provisional, as it is dependent on execution of the contract and payment of security deposit. That is why no actual date is mentioned in the letter of acceptance. There is, therefore, no substance in the alleged 'variations' of the terms of the contract.

On the second ground, it is argued that the guarantee document lacks consideration because it was issued not at the request of the plaintiffs or the defendant, but at the request of Beton who was a customer of the defendant bank. It was at the request of Beton that the defendant gave the guarantee to the plaintiffs — so it is alleged. Counsel for the defendant contends that, if the defendant had asked the plaintiffs to award the contract to Beton on the undertaking of the defendant to give the guarantee, then there is consideration. Paragraph 782 of the *Halsbury's* Laws of England, Volume 18, 3rd Edition, states:

"The consideration for the surety's promise does not move from the principal debtor, but from the creditor. It need not

directly benefit the surety, though it may do so, and it may consist wholly of some advantage given to or conferred on the principal debtor by the creditor at the surety's request. Thus, the surety's promise often stipulates for a supply of goods or an advance of money to the principal debtor, or that the latter should be taken into the service or employment of the creditor."

In my view, to determine whether there is consideration or not, sections 79 and 80 of the Contracts Act should be considered. These sections provide:

"79. A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of which default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written.

80. Anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee."

In the present case, the guarantee is given not for the benefit of the plaintiffs as alleged by the defendant, but for the benefit of the principal debtor (Beton) because without it, Beton would not be able to commence work and would be deprived of the benefits of the contract already awarded to it. Under clauses 33(a) and 40 of the conditions of contract, Beton could give the plaintiffs 5% of the contract sum either in cash or by banker's guarantee as security deposit, and Beton has opted to give the banker's guarantee. The guarantee is given not for the purpose of persuading the plaintiffs to accept Beton's tender but only in respect of security deposit required under paragraph 3 of the Acceptance of Tender (Exhibit P2) and confirmed by clauses 33(a) and 40 of the conditions of contract. This is so stated in the guarantee itself. The contract sum is about $2.7 million, but the guarantee is in respect of a smaller sum of $135,666. The transaction in respect of the security deposit is in the nature of a contract within a main contract. The plaintiffs say we will allow you to commence work on consideration that you give us $135,666 either in cash or by banker's guarantee. Thus, before October 16, 1972, the plaintiffs did not know whether Beton was going to give them cash or banker's guarantee. It was only when the guarantee was given to them on that date that they knew of the defendant's bank guarantee. So, the fact that the guarantee is dated October 12, 1972 does not matter. In fact, the guarantee is stated to be effective from October 15, 1972 to January 15, 1974, and it was only on October 16, 1972 that Beton handed the document to the plaintiffs. Since the guarantee is for the benefit of the principal debtor, I am of the view there is consideration for the guarantee. By the guarantee, the defendant in effect requests the plaintiffs to allow Beton to commence work, on its promise to pay the plaintiffs the sum of $135,666 in the event of Beton's failure to perform the covenants of Beton's contract with the plaintiffs. The transaction between the three parties can also be considered in this way. Instead of Beton depositing $135,666 in cash with the plaintiffs, the defendant issued the guarantee to the plaintiffs, making itself liable for the said sum if Beton failed to perform the covenants of its contract. In either case, the defendant is liable to the plaintiffs for the sum guaranteed as 'surety' under section 79 of the Contracts Act, when Beton stopped construction work on July 12, 1973. Counsel for the defendant also argued that there is no consideration because the guarantee and the contract were not executed contemporaneously. It is true that the guarantee was dated October 12, 1972, and the written contract (AB1) was executed on October 16, 1972. There was already a binding contract between the plaintiffs and Beton on September 4, 1972; but assuming there is a doubt whether the contract came into existence on September 4, 1972, i.e. the date when Beton's tender was accepted by the plaintiffs, or on October 16, 1972 when the formal written contract was executed by the parties, is irrelevant in the present dispute. As I have stated earlier on, the contract of guarantee (AB2) is separate and distinct from the main contract (AB1) between the plaintiffs and Beton. The defendant is not a party in the main contract. It is only a party in the minor contract as a surety. As such, whether the guarantee issued on October 12, 1972 was contemporaneous with liability arising out of contract (AB1) is not really material. Even if it is material, liability already existed on September 4, 1972 for Beton to pay 5% of the contract sum as security deposit for the due performance of the contract. Instead of paying in cash, Beton opted to pay by way of banker's guarantee, and the defendant agreed to be the surety. There was thus subsisting liability on the part of Beton to pay 5% of the contract sum to the plaintiffs when the defendant gave the guarantee. The presence of subsisting liability referred to in *Wauthier* v. *Wilson*[2] has, therefore, been fulfilled. As regards the authority in *Ram Narain* v. *Lt. Col. Hari Singh*,[3] in dealing with section 127 of the Indian Contracts Act — which is equivalent to our section 80 — the court held that guarantee is in the nature of a collateral engagement to answer for the debt, default or miscarriage of another as distinguished from an original and direct engagement for the parties own act. For the validity of a contract of guarantee, it is adequate consideration if anything is done or any promise made for the benefit of the principal debtor. It was also held that anything done or any promise made for the benefit of the principal debtor must be contemporaneous to the surety's contract of guarantee in order to constitute consideration therefor. A contract of guarantee executed afterwards without any consideration is void. In *Ram Narain's* case, the court held that the contract of guarantee was one without consideration since nothing was done for the benefit of the principal debtor on the day when the contract of guarantee was executed. Illustration (c) of section 80 reads:

"A sells and delivers goods to *B*. *C* afterwards, without consideration, agrees to pay for them in default of *B*. The agreement is void."

Having regard to the above illustration and the judgment in *Ram Narain's* case, I hold that to sustain the validity of a contract of guarantee, the creditor must have done something for the benefit of the principal debtor. The benefit must be given either at the time of execution of the guarantee or in the future, but not a past benefit. An example of future benefit is a guarantee given for bank overdraft. The guarantee is given first before the creditor lends money to the principal debtor.

In the present case, the contract of guarantee is

valid because the benefit given to Beton is not a past benefit. On execution of the contract of guarantee and on the document being presented to the plaintiffs, Beton was given the right and benefit of commencing work. Further, in the present case, the defendant was fully aware that the plaintiffs had awarded the contract to Beton which can be inferred from the contents of the guarantee document itself. The defendant must have known that a security deposit was required by the plaintiffs for the due performance of the contract. The guarantee (AB2) was issued by the defendant and addressed to the plaintiffs. It is reasonable to infer that the defendant must have seen the tender documents (Exhibit P1), the Acceptance of Tender (Exhibit P2) and the contract document to be executed. Otherwise, the defendant, being a reputable bank, would not have issued the guarantee. At the bottom of the tender documents, it is stated on the first page that "Copies of the Contract Agreement, the above Drawings, Bills of Quantities and/or Specification may be seen" at the plaintiffs' office. Since the defendant has not led any evidence, it can be assumed the defendant must have seen all these documents. The contract document in this case is in the standard form used by Government Departments and adopted by some Statutory Bodies like the plaintiffs. Therefore, apart from the guarantee document itself, the defendant must have known a security deposit was required. The purpose of the guarantee must have been within the knowledge of the defendant; so is the benefit that would accrue to the principal debtor from the creditor. The defendant thus requested the plaintiffs to allow Beton to commence work by issuing the guarantee. The contention that the guarantee lacks consideration must, therefore, fail.

On the third ground, it is contended that the plaintiffs' claim is barred by limitation. The security guarantee (AB2) is effective from October 15, 1972 to January 15, 1974 and is conditional upon a claim thereunder being made by the original or any revised expiry date. It is not in dispute there is no revised expiry date. The guarantee, therefore, expired on January 15, 1974. The question for determination is whether the word 'claim' means filing a writ in court or merely a claim or demand by the creditor from the surety. In short, on the true construction of the guarantee, must the plaintiffs file a writ on or before January 15, 1974? In my judgment, the word 'claim' in the guarantee cannot mean filing a writ, as under Limitation Ordinance, the plaintiffs are only barred six years from the date when cause of action arose. Cause of action under the contract of guarantee clearly arises after a claim or demand is made to the defendant by the plaintiffs for the sum guaranteed. The word 'claim' must necessarily mean a demand or claim by the creditor from the surety. Beton stopped construction work in breach of the contract on July 12, 1973 and the plaintiffs made a claim of the sum guaranteed through their solicitors from the defendant *vide* letter dated July 27, 1973 (AB3). The defendant on August 6, 1973 through its solicitors denied liability in AB4. The plaintiffs have, therefore, complied with the condition in the guarantee by making a claim well within the period of guarantee. Their claim in court can only be statute-barred six years from July 27, 1973. In the present case, the plaintiffs' writ was filed on January 15, 1974 and, as such, their claim is not barred by limitation.

On the fourth and final ground, it is argued that even if the guarantee is valid, the plaintiffs' claim cannot succeed by virtue of clause 37(c)(iv) of the contract read in conjunction with section 81 of the Contracts Act which provides that the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract. Clause 37(a) provides instances of 'default' by Beton and clause 37(b) stipulates instances of bankruptcy and assignment by Beton, upon which events the plaintiffs are entitled to determine the contract. Clause 37(c) provides the rights of the plaintiffs on determination of the contract pertaining to completion of the project by themselves departmentally or by another contractor. Clause 37(c)(iv) reads:

"Until completion of the Works under this clause no payment shall be made to the Contractor under this Contract; provided that, upon completion as aforesaid and the verification within a reasonable time of the accounts therefor, the Superintending Officer shall certify the amount of expenses properly incurred by Government; and if such amount added to the moneys paid to the Contractor before such determination exceeds the total amount which would have been payable on due completion the difference shall be a debt payable to Government by the Contractor; and if the said amount added to the said moneys be less than the said total amount the difference shall be a debt payable by Government to the Contractor."

Counsel for the defendant contends that there is no evidence as to what would be the difference that have to be paid by the defendant, and as the liability of the defendant is co-extensive with that of Beton and the extent of the amount that can be claimed under clause 37(c)(iv) has not been established, the plaintiffs' claim cannot be maintained by virtue of paragraph 9 of the defence. In my view, this argument has no merit. As stated earlier on, the defendant is not a party to the main contract (AB1). The defendant is only a party to the contract of guarantee (AB2). As such, it cannot take any advantage that may accrue to Beton under clause 37(c)(iv) which relates to the whole contract sum of $2.7 million. The defendant is merely a surety in the contract of guarantee for a fixed sum of $135,666. The extent of liability of the defendant is fixed, but the same cannot be said in respect of Beton under the main contract. Thus, as far as the contract of guarantee is concerned, the liability of the defendant is co-extensive with that of Beton to the extent of $135,666, but not to the whole contract sum of $2.7 million. There is, however, no legal requirement for the plaintiffs to claim from Beton first before suing the defendant on the guarantee. As such, clause 37(c)(iv) and section 81 cannot assist the defendant.

For the above reasons, I find that the contract of guarantee is valid and that the plaintiffs' claim is maintainable. I need only add that having regard to the pleadings, it is not open for the plaintiffs to submit that AB2 is an indemnity and not a guarantee, although the plaintiffs' claim may also be maintainable as indemnity in view of the similarity between the present case and the case of *Guild & Co.* v. *Conrad.*[4] In that case, it became important for the court to decide whether the promise given is a guarantee or indemnity

in view of the Statute of Frauds which required a guarantee to be in writing. The distinction between guarantee and indemnity can be found in *Pollock & Mulla* on Indian Contract and Specific Relief Acts, Ninth Edition, at page 612. Having regard to the authorities, I am inclined to the view that Exhibit AB2 is a contract of guarantee.

Accordingly, I enter judgment for the plaintiffs in the sum of $135,666 with interest at 6% per annum from July 27, 1973 up to date of realisation and costs.

Judgment for the plaintiff.

Solicitors: *Zain & Co.; Allen & Gledhill.*

SINO MALAY TRANSPORT SDN. BHD. v. QBE INSURANCE LTD.

[O.C.J. (Mohamed Azmi J.) February 28, 1979]
[Kuala Lumpur — Originating Motion No. 63 of 1977]

Insurance — Workmen's Compensation Insurance — Repudiation of liability — Whether effective — Reference to arbitration in case of dispute — Application for enlargement of time.

Arbitration — Application for enlargement of time to refer to arbitration — Undue hardship — Arbitration Act, 1952, s. 28.

In this case the applicant had taken out a Workmen's Compensation Policy from the respondent to cover its drivers and attendants in respect of its motor lorries. An injured driver of the applicant claimed damages for negligence and breach of statutory duty. The respondent informed the applicant that it disclaimed liability. Judgment was given against the applicant and it claimed the judgment sum from the respondent under the contract of insurance. Under the policy disputes should be referred to arbitration within twelve months of the date of dispute. The applicant applied for enlargement of time for arbitration.

Held: (1) the respondent had effectively repudiated its liability under the policy of insurance;

(2) in this case and in view of the long delay there would be greater hardship to the respondent if the application for enlargement of time were to be granted. The application must therefore be dismissed.

Cases referred to:-

(1) *Warney, Combe, Reid & Co. Ltd.* v. *E.M. Dower & Co. Ltd.* [1956] 2 Lloyds L.R. 325 C.A.

(2) *Liberian Shipping Corporation* v. *A. Kong & Sons Son* [1967] 1 All E.R. 934 C.A.

The following case was also referred to in argument: *Safety Insurance Company Sdn. Bhd.* v. *Chow Soon Tat* [1975] 1 M.L.J. 193.

ORIGINATING MOTION.

Joga Singh for the applicant.

Cecil W. Abraham for the respondent.

Cur. Adv. Vult.

Mohamed Azmi J.: This is an application by notice of motion dated June 3, 1977 by the applicant, for an order that a fit and proper person be appointed to act as an arbitrator under section 12 of the Arbitration Act, 1952, or, alternatively, in the event that the court finds the respondent has validly made a repudiation of liability by its letter dated October 17, 1972 pursuant to condition 8 of the Workmen's Compensation Policy No. 136WC/50475, for an order of enlargement of time for arbitration under section 28 of the Act.

The facts in this case may be summarised as follows. The applicant, a transport company, took out a Workmen's Compensation Policy from the respondent to cover its drivers and attendants in respect of six motor lorries in the States of West Malaysia. The policy covered the period from September 2, 1966 to September 1, 1969. During the currency of the policy, one of the motor lorries was involved in an accident on April 21, 1969, in which the driver Teo Kah Wa was injured. It would appear that the accident occurred when the front near-side wheel of the lorry suddenly came off and the vehicle went off the road and overturned. On September 5, 1972, the injured driver issued a writ against the applicant claiming damages for negligence and breach of statutory duty *vide* Muar High Court Civil Suit No. 108 of 1972. On October 7, 1972, the respondent wrote to the applicant which the respondent claims to be a letter of repudiation, by which it disclaims liability pursuant to condition 8 of the policy. (See "PKH.26"). The applicant, however, does not accept the letter as a valid letter of repudiation, and on November 23, 1972 the applicant's solicitors, Messrs. Miranda & Co., filed a defence to the claim of the injured lorry driver. Judgment for the sum of about $30,000 was obtained by the lorry driver against the applicant on January 8, 1977. The applicant now claims the judgment sum against the respondent under the contract of insurance. In view of the respondent's stand that it has already disclaimed liability on September 5, 1972 by virtue of condition 8 of the policy, any claim must be referred for arbitration within twelve months of that date. Any claim not referred for arbitration after that period shall be deemed to have been abandoned and shall not be recoverable under the policy. Hence, the present application by the applicant for enlargement of time for arbitration unless the court decides Exhibit PKH.26 does not constitute a valid repudiation of liability.

Condition 8 of the policy provides:

"All differences arising out of this Policy shall be referred to the decision of an Arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single Arbitrator to the decision of two Arbitrators one to be appointed in writing by each of the parties within one calendar month after having been required in writing so to do by either of the parties or in case the Arbitrators do not agree of an Umpire appointed in writing by the Arbitrators before entering upon the reference. The Umpire shall sit with the Arbitrators and preside at their meetings and the making of an Award shall be a condition precedent to any right of action against the Company. If the Company shall disclaim liability to the Insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder."

The first issue for determination is whether on September 5, 1972, the respondent has effectively disclaimed liability *vide* its letter to the applicant marked Exhibit "PKH.26". In view of its importance, the whole letter is reproduced below:

"7th October, 1972

Messrs. Sino-Malay Transport Co.,
Sdn. Bhd.,
No. 154, Jalan Sialang,
Tangkak, Johore.